Supreme Court, U.S.
FILED
APR 2 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

DAN AMES, Petitioner

V.

DANIEL SUMMEY, JERRY DAGENHART,
DOUGLAS JAMES HUDSON, Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Dan Ames
P.O. Box 1204
Hendersonville, NC 28793
(704) 684-0911

Petitioner, Pro Se

QUESTIONS PRESENTED

1. In a case involving multiple defendants, may the plaintiff be denied a hearing on each defendant's motion for summary judgment under Rule 56, when the acts of the individual defendants, while in concert, are different in specifics, and the motion of the police officer for summary judgment is subsequent to the hearing on the co-defendant's motion, as well as the basis for the lower Court's decision to grant summary judgment.

2. Does the defense of "good faith" outlined in Malley v. Briggs prevail over the "presumption of lack of cause" in a nolle prosequi in a case where the police officer has confiscated a vehicle without due process (Cong Globe, 42d Cong)(Waters v. Parrish)(Monroe v. Pape)(Crawford v. Houston).

3. Does the statement of the Fourth Circuit

Court of Appeals that it will: "review the entire record on appeal for possible meritorious issues; it will not limit its review solely to the issues raised in the parties' briefs." constitute an infringement of Petitioner's (Appellant's) right to due process should that court fail to recognize those issues that would affect the party's cause adversely, and should the Petitioner forfeit the right to raise certain questions to the Supreme Court therefore.

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LISTING OF PARTIES

The parties to the proceeding below are the Petitioner Dan Ames and the Respondents Daniel Summey, Jerry Dagenhart and Douglas James Hudson.

Dan Ames is a resident of Henderson County, N.C.

Daniel Summey is a police officer in Hendersonville, N.C.

Jerry Dagenhart was the manager of an insurance company located at Atha Plaza, Hendersonville, N.C.

Douglas James Hudson was the operator of a tow truck for Hudson Chevron located in Naples, N.C.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

DAN AMES,

Petitioner,

vs.

DANIEL SUMMEY,
JERRY DAGENHART,
DOUGLAS JAMES HUDSON,

Respondents.

NOW COMES DAN AMES, the petitioner, pro se, and prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth District entered in the above-entitled case on 29 November 1989, which affirmed the judgment of the United States District Court for the Western District of North Carolina, dated July 4, 1989.

OPINIONS BELOW

The opinion and findings of the District Court are reprinted as Appendix A.

The opinion of the Court of Appeals, 4th District, is reprinted as Appendix B. The latter opinion was unpublished.

The opinion of the Court of Appeals, 4th District, on Petitioner's Petition for Rehearing with Suggestion for Rehearing in Banc, is reprinted as Appendix C. The opinion was unpublished.

JURISDICTION

The opinion of the Court of Appeals for the Fourth Circuit was filed Nov 29, 1989. A Petition for Rehearing was filed by Petitioner and the same was denied by the Court of Appeals on Jan 2, 1990, by Judges Winter, Russell and Hall. Jurisdiction of this court is conferred by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment provides "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment provides that "no person shall be deprived of life, liberty, or property, without due process of law."

The Seventh Amendment provides that "in Suits at common law, the right of trial by jury shall be preserved."

STATUTES INVOLVED

Rule 56 provides, in pertinent part, that: "(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the

time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

STATEMENT OF THE CASE

This is a case involving the violations of a U.S. citizen's rights under the Constitution of the United States.

The basis for federal jurisdiction in the court of first instance was: 28 U.S.C. Sections 1331 and 1343; 42 U.S.C. Sections 1983 and 1988; and the First, Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

The petitioner, Dan Ames, on 15 September 1984, parked his car in a parking lot of a group of stores known as Atha Plaza. The respondent Jerry Dagenhart, manager of an office located in Atha Plaza, called a wrecker service, and instructed them to haul away the car, describing it as abandoned.

Respondent Douglas James Hudson arrived at the scene and proceeded to attach the wrecker in preparation of towing the car. Ames observed Hudson attaching his wrecker to the car,

advised Hudson that he was the owner, the car was not abandoned, and that the wrecker should be detached. Hudson refused to do so unless he was paid for his services. Ames, having not called for a wrecker, or benefitted by the service, refused to do so. Respondent Dagenhart also refused to pay for Hudson's service.

Hudson called the Hendersonville Police Department and Respondent Daniel Summey, an officer of the Hendersonville Police Department was dispatched to the scene. He informed the parties, "This is a civil matter, on private property, I am here to see that you don't get into a fight about it." He then, along with Hudson and Dagenhart, proceeded in the direction of Dagenhart's office, the entry of which was not within the view of Ames who remained with his car.

After five to ten minutes, they returned and Summey told Hudson that he could tow the car.

Hudson asked Summey to have Ames, seated in the car, straighten the wheels so that the car could be towed. Summey told Ames to straighten the wheels. Ames refused to do so, stating "If I were to do that I would be aiding and abetting the stealing of my own car." Summey ordered Ames to get out of the car. Ames did so. Summey ordered Ames to hand him the keys to the car. Ames did so. Summey handed the keys to Hudson, placed Ames in the rear of the police cruiser, the windows of which were closed on a day which was very hot, thereby threatening the physical safety of the Petitioner. Summey again headed in the direction of Dagenhart's office remaining away about ten minutes, while Ames remained locked in the police car without ventilation.

Summey returned to the cruiser, and drove to the Magistrate's office where he executed an arrest order for disorderly conduct. The warrant for arrest read:

* * *

I, the undersigned, find that there is probable cause to believe that on or about the date of offense shown and in the county named above the defendant unlawfully, willfully and intentionally cause a public disturbance at Atha Plaza, 601 Greenville Highway, conduct creating a threat of imminent fighting. The conduct consisted of Mr Ames refusing to at request of Officer Summey to straighten the wheels of car which was to be towed at the request Jerry Dagenhart after having been there some time with out permission. This conduct consisted of Mr. Ames refuses to pay tow bill, and having an argument with parties involved. This act in violation of the law referenced on this Warrant.

* * *

Ames was released on signature bond.

During the next week, Ames requested both Hudson and Dagenhart to return the car; both

Dagenhart and Hudson refused to comply.

Finally, Ames filed an action in small claims court for return of the car and compensation for the time it was away. Prior to the trial the car was returned to him by Dagenhart. At the trial, the Judge informed Dagenhart and Hudson that they had violated Ames constitutional rights and allowed Ames compensation.

At Ames subsequent trial for disorderly conduct he entered a motion for dismissal based on Allen vs. N.C. which provides that a person whose rights are being violated may protest and that he can not be arrested for a lesser charge such as disorderly conduct. The motion was denied, Ames was found guilty, and received a suspended jail sentence. Ames appealed and, in Superior Court, the case was dismissed after the Assistant District Attorney stated "Officer Summey appeared before me and stated that he could not present a case against Mr. Ames."

Ames then, initially pro se but later represented by attorney, instituted an action in Federal District Court under Section 1983, requesting that the case be heard by a jury. The complaint was amended by Ames and then again by his attorney. His case survived various challenges for cause, Judge Robert D. Potter deciding for the plaintiff in his order of Oct 11, 1988.

Judge Potter, on March 1, 1988, issued a pretrial order requiring that:

"1.) Unless already filed, responsive pleadings shall be filed within TEN DAYS of the filing of this order.

2.) All counsel should anticipate a trial within 120 Days of the filing of this Order. If more time is needed, counsel should immediately notify the CLERK OF COURT, so that procedures as in complex cases may be adopted.

5.) MOTIONS DEADLINE: All motions must be filed no later than one week before the first day of the term in which this case has been placed on a published trial calendar or otherwise set for trial by the Clerk of Court. No motions will be allowed after that date except by leave of court."

Petitioner Ames was deposed on Mar 16, 1988. Efforts by Ames' attorney to schedule a date convenient for the three defendants to be deposed was unsuccessful, and after the 100 day deadline imposed by Judge Potter's pretrial order had expired, the latter issued an order blocking the deposition of the defendants.

Petitioner's lawyer, by his choice, withdrew as counsel on 21 Sep 1988, approved by Judge Potter on 17 Oct 1988.

On 13 January 1989, a Motion for Summary Judgment in behalf of respondent Dagenhart was entered, along with an affidavit by

Dagenhart. By this date, Judge Richard L. Voorhees had replaced Judge Potter. Judge Voorhees appointed Magistrate J. Toliver Davis to conduct hearings on motions. Magistrate Davis heard the motion of Dagenhart on 29 Feb 89.

On March 2, 1989, subsequent to the hearing on Dagenhart's motion, Magistrate Davis sent Petitioner a letter which stated, in part:

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Petitioner responded to the motions of each adverse party, and executed affidavits

establishing that there were issues in dispute and violations of precedent law that justified submission of the case to the jury.

Hearings on the motions of Summey and Hudson for summary judgment were not scheduled or held.

Judge Voorhees, on July 4, 1989, issued his order granting the Defendants' motions for summary judgment. This order stated, in part:

"After carefully reviewing Magistrate Davis' memorandum and Mr. Ames' objections thereto, the Court concludes that while there is factual dispute as to some things concerning the events that occurred involving Mr. Ames and the named defendants, Magistrate Davis' central conclusions are correct. Specifically, he found that Officer Summey is entitled to qualified immunity from suit because the undisputed facts gave him an objectively reasonable basis to arrest Mr. Ames as a matter of law, and that the other two defendants are unsuable under 18 U.S.C.

1983 because they are private individuals and not state actors. A review of the record convinces the Court that these conclusions are correct. The disputed details of the incident would not affect these conclusions."

The issues raised herein were raised in a timely fashion in the Fourth District Court of Appeals. Questions 1 and 2, presented herein, were raised by Petitioner in his initial appeal and his petition for rehearing:

"Appellee Daniel Summey, on September 15 1984, while serving as an officer of the Hendersonville Police Department, and in concert with Appellees Hudson and Dagenhart, confiscated Appellant's property without a warrant."

ARGUMENT

Johnson Foils, Inc v. Huyck Corp. states: "Summary Judgment is very drastic remedy, saying to losing party that court is so certain that nothing you have said even raises material issue that you will be denied opportunity to have day in court on your claims; emphasis in motion for summary judgment is that court must be certain that court is not depriving party of fundamental right to trial, and this is why law puts great burden of proof upon movant and allows presumptions in favor of opposing party."

In Ames vs. Summey, the Court has found "that Officer Summey is entitled to qualified immunity from suit because the undisputed facts gave him an objectively reasonable basis to arrest Mr. Ames as a matter of law, and that the other two defendants are unsuable under 18 U.S.C. 1983 because they are

private individuals and not state actors." The Court admitted that there is factual dispute as to some things concerning the events that occurred involving Mr. Ames and the named defendants, but believed that these disputed details of the incident would not affect these conclusions.

The affidavit of Petitioner stated: "Defendant Hudson asked Defendant Summey to have Plaintiff Ames straighten the wheels of the automobile, which were at an angle. Defendant Summey told Ames to straighten the wheels. Ames refused to do so and stated, "If I did that I would be aiding and abetting the stealing of my own vehicle." Defendant Summey ordered Ames, who was then seated in his, Ames', car to get out of the car. Ames did so, locking the door of the car as he did so. Defendant Summey ordered Ames to hand him, Summey, the keys to the car. Ames, under protest, did so, pausing only to detach the keys

from other keys on the key ring. Defendant Summey did not at that time or any other time have a warrant to confiscate Ames' car. Defendant Summey then handed the keys of Ames' automobile to Defendant Hudson. Defendant Summey then placed Ames in the rear seat of the police cruiser and locked him therein".

The affidavit of Respondent Summey states" That upon arriving at the scene, this affiant attempted to restore quiet and order, and advised the plaintiff that his car could be towed away and that he (the affiant) did not want to arrest him; that the plaintiff became louder and more boisterous in his speech, manner and activities, finally actively attempting to stop the towing of the vehicle; that this affiant repeatedly told the plaintiff that he did not want to arrest him (Ames), but he must tone down his behavior. That Ames became more loud and boisterous in

his behavior and this affiant finally advised him of his arrest for disorderly conduct. That this affiant acted in good faith, in the discharge of his duties as a police officer, and that none of such actions were in company with any other person or as a result of any preconceived plan or conspiracy; that he was not acquainted with Dan Ames prior to this incident, nor knew anything about him; that he had not discussed any program or plan relative to plaintiff's car with defendants Hudson or Medley; that he had no preconceived plan of action upon his arrival at the scene of the incident, and had not discussed the same with anyone."

Harris v. Roseburg There may be deprivation within meaning of 42 USCS Section 1983 not only where there has been actual "taking" of property by police officer, but also where officer assists in effectuating repossession over objection of debtor or so intimidates

debtor as to cause him to refrain from exercising his legal right to resist repossession.

In Ames v. Summey, the issue does not involve repossession or a debtor/debtee relationship, however, the "taking" of Petitioner's car keys after ordering him to "hand me the keys" parallels Harris v. Rosenberg by relating both the personal involvement and the intimidation of the petitioner by the police officer.

Clark v. Beville states: Police officer is shielded from liability for civil damages only insofar as conduct does not violate clearly established statutory or constitutional rights of which reasonable person would have known; plaintiff in 42 USCS Section 1983 action can rebut police officer's immunity by showing that officer lacked good faith.

Adams v. Thompson states: Testimony by police

officer that he had no personal grudge against civil rights plaintiffs and was not personally acquainted with either of them prior to incident in question is not sufficient to raise issue of qualified good faith immunity from damages in suit under 42 USCS Section 1983.

Losch v. Parkesburg states: Police officers who act in violation of arrestee's clearly established constitutional rights lack qualified immunity regardless of whether they acted maliciously or in bad faith.

The Warrant for Arrest of Petitioner, sworn to by Respondent Summey, stated: I, the undersigned, find that there is probable cause to believe that on or about the date of offense shown and in the county named above the defendant unlawfully, willfully, and intentionally cause a public disturbance at Atha Plaza, 601 Greenville Highway, conduct creating a threat of imminent fighting. The

conduct consisted of Mr Ames refusing to at request of Officer Summey to straighten the wheels of car which was to be towed at the request Jerry Dagenhart after having been there for some time with out permission. This conduct consisted of Mr. Ames refuses (sic) to pay tow bill, and having an argument with parties involved. This act in violation of the law referenced on this Warrant."

The sum of the actions at the scene, based on the Warrant for Arrest, were: the Petitioner refused to straighten the wheels of his car, he refused to pay tow bill, and he had an argument with parties involved. For these actions, or refusals, he was arrested for disorderly conduct.

The Affidavit of Officer Summey does not specifically address the issue of whether or not a warrant for seizure of the automobile was obtained, only that "this affiant acted in good faith, in the discharge of his duties

as a police officer"; the Affidavit of Ames states: "Defendant Summey ordered Ames to hand him, Summey, the keys to the car. Ames, under protest, did so, pausing only to detach the keys from other keys on the key ring. Defendant Summey did not at that time or any other time have a warrant to confiscate Affiant Ames' car."

The Amendments to the Constitution provide that the right of free speech will not be abridged; the right of the people to be secure in their effects against unreasonable seizures shall not be violated.

Limits that Fourth Amendment imposes upon police conduct are well established, and should these limits be exceeded, arresting officer may be liable for damages under Civil Rights Act or in federal common-law action arising under Amendment itself. Sullivan v. Murphy

Good faith defense is unavailable to law enforcement officer under 42 U.S.C.S. Section 1983 if he acts in disregard of undisputed or clearly established constitutional rights. Reese v. Nelson

"It has been held that neither specific intent nor purpose to deprive an individual of his civil rights is a prerequisite to the civil liability of a policeman under Civil Rights Act, 42 USC Section 1983. The courts have interpreted the civil provisions of the Civil Rights Act so as to make actionable the conduct of arresting officers in unlawfully arresting and detaining them without cause, and in conducting an unauthorized and unwarranted seizure." Cong Globe; Monroe v. Pape.

Police officer is not protected by absolute immunity from suit brought under 42 USCS Section 1983, but only by qualified immunity requiring him to raise defense of good faith. Jennings v. Shuman

The defense of good faith was not raised by any respondent. The Motion for Summary Judgment of each respondent bases its motion on "the ground that there is no genuine issue of material fact."

The Petitioner contends that his failure to contest the findings and judgment of the Court on this specific issue was based on his status as a pro se petitioner. Further, he contends that the statement of the Appeals Court that it would "review the entire record on appeal for possible meritorious issues; it will not limit its review solely to the issues raised in the parties' briefs." places the burden of neglect on that Court.

The Petitioner, in his responses to the motions of defendants, contested the grounds stated therein. He should not be expected to competently address causes not at issue.

United States v. United Scenic Artists, etc. states: "It is well settled in Second Circuit that summary judgment can be granted only if there is no genuine dispute as to any material fact, and that this requirement is to be strictly construed so as to insure that factual issues will not be determined without benefit of truth-seeking procedures of trial."

Waters v. Parrish (1975, WD, Va) states: "complaint which alleges that concerted actions of police and private parties in towing away plaintiff's automobiles without issuing them citations or summonses and without affording them hearing in order to contest such action deprived them of law under color of state law states cause of action under 42 USCS Section 1983."

Petitioner established in the State court that Respondents Dagenhart and Hudson had no

right (respectively) to order the towing or to tow the car. Further, it is noted that the charge of disorderly conduct when appealed to the Superior Court was dismissed based on Respondent Summey's nolle prosequi.

Hearings on the Motions for Summary Judgment of Respondents Summey and Hudson were neither scheduled nor held, despite the fact that the findings of the Magistrate and the Trial Court dealt primarily with Summey.

The Petitioner contends that the Finding of a Magistrate that is not supported by either affidavit or the record; that is unresponsive to the motion of the movant; that has not been heard as required by Rule 56; and that is relied upon in the decision of the lower court violates the basic right of a party to due process under the common law.

A Comparison of the Magistrate's statement and the Defendants' (Respondents') affidavits

shows clearly that the latter do not mention "communication of threats"; further, the Plaintiff (Petitioner) denied under oath having made any threat of physical violence; admitted was his threat that he would resort to the courts to right the violations against him.

Finally, a review of the record discloses that the District Court has: ignored the basic precepts of the Constitutional Amendments; has failed to address the content of the movants' motions for summary judgment thereby ignoring due process; has failed to accurately and fairly relate facts contained in affidavits and the record; has ignored precedents established by this Court and other Federal Courts; and has avoided addressing issues which should be dispositive. Consequently, it has so far departed from the accepted and usual course of judicial proceedings as to call for

an exercise of this Court's power of supervision.

Respectfully submitted this 29th day of March, 1990.

Dan Ames
P.O. Box 1204
Hendersonville, N.C. 28793
(704) 684-0911

Petitioner Pro Se

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

DAN AMES, Plaintiff	)	DOCKET NO. A-C-8 7-2 23
v.	)	
DANIEL SUMMEY, JERRY DAGENHART, and DOUGLAS JAMES HUDSON, Defendants.	)	ORDER

Currently before the Court are Defendant's Motions for Summary Judgment pursuant to Rule 56. The Motions were referred to U.S. Magistrate J. Toliver Davis for a recommended ruling. On April 11, 1989, Magistrate Davis entered a memorandum recommending that summary judgment be granted to all defendants. Plaintiff pro se Dan Ames entered a reply in opposition to the recommendation on April 21, 1989. He disputed numerous statements contained therein.

After carefully reviewing Magistrate Davis' memorandum and Mr. Ames' objections thereto,

the Court concludes that while there is factual dispute as to some things concerning the events that occurred involving Mr. Ames and the named defendants, Magistrate Davis' central conclusions are correct. Specifically, he found that Officer Summey is entitled to qualified immunity from suit because the undisputed facts gave him an objectively reasonable basis to arrest Mr. Ames as a matter of law, and that the other two defendants are unsuable under 18 U.S.C. 1983 because they are private individuals and not state actors. A review of the record convinces the Court that these conclusions are correct. The disputed details of the incident would not affect these conclusions.

Accordingly, the Defendants' Motions for Summary Judgment are GRANTED.

SO ORDERED, this the 4th day of July, 1989.

/s/Richard L. Voorhees
/t/RICHARD L. VOORHEES
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No. 89-1499

DAN AMES

Plaintiff - Appellant

v.

DANIEL SUMMEY; JERRY DAGENHART; DOUGLAS JAMES HUDSON

Defendants - Appellees

APPEAL FROM the United States District Court for the Western District of North Carolina.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of North Carolina.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/John M. Greacen
CLERK

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
NO. 89-1499

DAN AMES

Plaintiff - Appellant

v.

DANIEL SUMMEY; JERRY DAGENHART;DOUGLAS JAMES HUDSON

Defendants - Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for

rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Winter with the concurrence of Judge Russell and Judge Hall.

For the Court,

/t/JOHN M. GREACEN
CLERK

Note: The above order, while not dated (or signed) was filed on Jan 2, 1990.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1499

DAN AMES, Plaintiff	)	
	)	PLAINTIFF' S BRIEF
vs.	)	IN SUPPORT OF
	)	THE SUFFICIENCY OF
DANIEL SUMMEY, JERRY DAGENHART, DOUGLAS JAMES HUDSON, Defendants	)	HIS APPEAL

This matter is before the Court on the Plaintiff's appeal from the Findings and Recommendations of the Magistrate, 11 April 1989, the Order of the District Court, 4 July 1989, and the Judgment of the District Court, 4 July 1989, which allowed the motion for summary judgment and dismissed the case on its merits. These actions are based on assertions which can be categorized as follows:

1. The Plaintiff has failed to controvert the claims of the Defendant(s).

2. The Plaintiff has failed to provide the elements necessary to establish a case for malicious prosecution, and that the arrest of the Plaintiff by Defendant Summey was lawful.

3. The Defendant(s) have established that a conspiracy did not exist.

As is more particularly set forth below, these assertions are without merit and the findings and resulting order should be reversed.

I. THE JUDGMENT SOUGHT SHALL BE RENDERED FORTHWITH IF THE PLEADINGS, DEPOSITIONS, ANSWERS TO INTERROGATORIES, AND ADMISSIONS ON FILE, TOGETHER WITH THE AFFIDAVITS, IF ANY, SHOW THAT THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND THAT THE MOVING PARTY IS ENTITLED TO A JUDGMENT AS A MATTER OF LAW.

In the action under consideration, the Plaintiff has averred repeatedly in the

pleadings that Defendant Summey took an active part by confiscating the Plaintiff's automobile (without warrant), turning the keys over to Defendant Hudson, and allowing Hudson to tow the automobile to Hudson's place of business. (Plaintiff's Brief, 4 Jan 88; Amended Complaint, 19 Jan 88; Plaintiff's Reply to Memorandum and Recommendation and Motion to Set Aside, 20 Apr 89; et al.)

II. THE ELEMENTS OF MALICIOUS PROSECUTION ARE THE INSTITUTION, OR PROCUREMENT OF THE INSTITUTION, OF A PROCEEDING AGAINST PLAINTIFF, MALICE, WANT OF PROBABLE CAUSE, AND TERMINATION OF THE PROSECUTION OR PROCEEDING IN PLAINTIFF'S FAVOR. (Barnette v Woody, 242 NC 424, 88 SE2d 223; Carson v. Doggett, 231 NC 629, 58 SE2d 609; Alexander v Lindsey, 230 NC 663, 55 SE2d 470; Taylor v Hodge, 229 NC 558, 50 SE2d 307; Perry v Hurdle, 229 NC 216, 49 SE2d 400; State v Mobley, 240 NC 476, 83 SE2d 100; Melton v

Rickman, 225 NC 700, 36 SE2d 276, 162 ALR 793; Manufacturers & Jobbers Finance Corp. v Lane, 221 NC 189, 19 SE2d 849; Miller v Greenwood, 218 NC 146, 10 SEd2 708; Mooney v Mull, 216 NC 410, 5 SEd2 122, 125 ALR 893; Mitchem v National Weaving Co., 210 NC 732, 188 SE 329; Abernethy v Burns, 210 NC 636, 188 SE 97; Dickerson v Atlantic Refining Co., 201 NC 90, 159 SE 446; Reichler v Tillman, 21 NC App 38, 203 SE2d 6

As to the above, the arrest, the court actions and the termination thereof are matters of public record.

Also, MALICE SUFFICIENT TO SUPPORT A CAUSE OF ACTION IS FURNISHED BY KNOWINGLY AND INTENTIONALLY MAINTAINING A PROSECUTION WITHOUT JUST CAUSE OR LEGAL EXCUSE. (Cook v Lanier, 267 NC 166, 147 SE2d 910; Fowle v Fowle, 263 NC 724, 140 SE2d 398; Abbitt v Bartlett, 252 NC 40, 112 SE2d 751.)

Also, A LAW OFFICER IS NOT IMMUNE FROM SUIT FOR MALICIOUS PROSECUTION WHEN HE ACTS CORRUPTLY AND MALICIOUSLY WITHOUT PROBABLE CAUSE AND NOT IN THE PUBLIC INTEREST. (Greer v Skyway Broadcasting Co., 256 NC 382, 124 SE2d 98.)

Also, THE COURTS HAVE INTERPRETED THE CIVIL PROVISIONS OF THE CIVIL RIGHTS ACT SO AS TO MAKE ACTIONABLE THE CONDUCT OF ARRESTING OFFICERS IN UNLAWFULLY ARRESTING AND DETAINING A PERSON WITHOUT CAUSE AND IN CONDUCTING AN UNWARRANTED SEIZURE OF PROPERTY. (See Cong Globe, 42d Cong, 1st Sess, pp 68, 80, 83-85); (Monroe v Pape (1961) 365 US 167, 5 L Ed 2d 492, 81 S Ct 473)

As to the above, the alleged fact that Defendant Summey confiscated the property of Plaintiff is supported by the Affidavit of Plaintiff and the absence of a warrant

authorizing Defendant Summey to confiscate the vehicle.

Further, the right of an individual to protest the illegal confiscation of his property is protected by the Constitution, as amended, and the specific ruling of N.C. v Allen, 14 N.C. App 485 188 SE2d, 568, 1972.

Also, A NOLLE PROSEQUI IS A SUFFICIENT TERMINATION OF A CRIMINAL ACTION TO SUPPORT AN ACTION FOR MALICIOUS PROSECUTION. (Taylor v Hodge, 229 NC 558, 50 SE2d 307; Perry v Hurdle, 229 NC 216, 49 SE2d 400, et al). ACCORDINGLY, THE DISMISSAL OF A CRIMINAL PROCEEDING BY REASON OF THE FAILURE OF THE COMPLAINANT TO APPEAR AND PROSECUTE IS A SUFFICIENT TERMINATION THEREOF TO SUPPORT AN ACTION FOR MALICIOUS PROSECUTION BASED THEREON. (Cook v Lanier, 267 NC 166, 147 SE2d 910.)

Also, IN A SUIT UNDER 42 USC PAR 1983, THE

PLAINTIFF NEED NOT PROVE THAT THE POLICE OFFICER ACTED WILFULLY OR WITH A SPECIFIC INTENT TO DEPRIVE THE PLAINTIFF OF A FEDERAL RIGHT. (15 Am Jur 2d, Civil Rights Par 14.)

III. THE SUPREME COURT HAS HELD THAT "TO ACT UNDER COLOR OF STATE LAW FOR SECTION 1983 PURPOSES DOES NOT REQUIRE THAT THE DEFENDANT(S) BE AN OFFICER OF THE STATE. IT IS ENOUGH THAT HE IS A WILLFULL PARTICIPANT IN JOINT ACTION WITH THE STATE OR ITS AGENTS. PRIVATE PERSONS, JOINTLY ENGAGED WITH STATE OFFICIALS IN THE CHALLENGED ACTION, ARE ACTING "UNDER COLOR" OF LAW FOR PURPOSES OF SECTION 1983 ACTIONS.

Further, COMPLAINT WHICH ALLEGES THAT CONCERTED ACTIONS OF POLICE AND PRIVATE PARTIES IN TOWING AWAY PLAINTIFF'S AUTOMOBILES WITHOUT ISSUING THEM CITATIONS OR SUMMONSES AND WITHOUT AFFORDING THEM HEARING IN ORDER TO CONTEST SUCH ACTION DEPRIVED THEM OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW UNDER COLOR OF STATE LAW STATES CAUSE ACTION UNDER 42 USCS SECTION 1983. (Waters v Parrish (1975, WD Va) 402 F Supp 696.

This, the 16th day of August, 1989.

/s/Dan Ames

/t/DAN AMES
P.O. Box 1204
Hendersonville, N.C. 28793
704/684-0911

APPENDIX E

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

A-C-87-223

DAN AMES,
Plaintiff,
vs.
DANIEL SUMMEY, JERRY DAGENHART, and DOUGLAS JAMES HUDSON,
Defendants.

DANIEL SUMMEY, being duly sworn, deposes and says:

That he is one of the defendants in the above-entitled action, and makes this affidavit in support of his motion for summary judgment. The following facts are relevant to the issues involved in the above-entitled action:

1. That he was, on or before September 15, a984, a member of the police department of the City of Hendersonville; that on that date he was assigned to the watch on duty, and instructed to respond to calls for assistance

from the City population, and to enforce its ordinances in the maintenance of peace and order.

2. That he was instructed to respond to a call for assistance in quelling a disturbance in an area referred to as "Atha Plaza" in Hendersonville.

3.Upon arriving at the scene, he observed the plaintiff, Dan Ames, and Douglas James Hudson, Jerry Dagenhart and Wayne Medley engaged in a heated conversation and in close proximity to a Cadillac automobile.

4. Jerry Dagenhart advised this affiant that the automobile (the property of Ames) had been setting in the parking lot of his office for approximately one week and in spaces reserved for customers; that he had called Douglas James Hudson (operator of Hudson's Chevron) to haul the car away; that the

Plaintiff, Ames, appeared, denied that the car had been there for a week and fell into a loud and boisterous argument regarding the wrecker bill, which led to the calling of the affiant.

5. That upon arriving at the scene, this affiant attempted to restore quiet and order, and advised the plaintiff that his car could be towed away and that he (the affiant) did not want to arrest him; that the plaintiff became louder and more boisterous in his speech, manner and activities, finally actively attempting to stop the towing of the vehicle; that this affiant repeatedly told the plaintiff that he did not want to arrest him (Ames), but he must tone down his behavior.

6. That Ames became more loud and boisterous in his behavior and this affiant finally advised him of his arrest for disorderly conduct.

7. That this affiant acted in good faith, in the discharge of his duties as a police officer, and that none of such actions were in company with any other person or as a result of any preconceived plan or conspiracy; that he was not acquainted with Dan Ames prior to this incident, nor knew anything about him; that he had not discussed any program or plan relative to plaintiff's car with defendants Hudson or Medley; that he had no preconceived plan of action upon his arrival at the scene of the incident, and had not discussed the same with anyone.

The foregoing facts are known by this affiant to be true, of his own knowledge; affiant is competent to testify to them and would so testify at any trial of the matter.

This 20th day of February, 1989.

/s/Daniel L. Summey
/t/Daniel Summey

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
A-C-87-223

DAN AMES Plaintiff,	)	
vs.	)	AFFIDAVIT
DANIEL SUMMEY, JERRY DAGENHART, and DOUGLAS JAMES HUDSON, Defendants.	)	

DAN AMES, being duly sworn, deposes and says: That he is the PLAINTIFF in the above entitled action, and makes this affidavit in support of his Motion in Opposition to Motion for Summary Judgment that contests the Motion for Summary Judgment of Defendant Summey dated February 20, 1989 and filed February 22, 1989.

The following facts are relevant to the issues involved in the above entitled action:

1. That he, Ames, is now and was, on September 15, 1984, a citizen of the United States residing in Henderson County, North Carolina.

2. That he was, on September 15, 1984, the owner of a 1974 Cadillac automobile registered in the State of North Carolina.

3. That, on the morning of September 15, 1984, he parked his 1974 Cadillac in a public parking lot at Atha Plaza with the purpose of going to a store located therein. That he had on numerous occasions parked the same automobile in the same parking lot for short periods of time for the same reason. That to his knowledge and belief there were no restrictions of any sort posted within the area that would limit the use of the parking lot in any manner.

4. That upon returning to his automobile, he, Ames, found the Defendant Hudson engaged in hooking a wrecker to the said automobile. Defendant Hudson stated that he, Hudson, had been told by Defendant Dagenhart to remove the automobile since it had been abandoned. He, Ames, told Defendant Hudson that he, Ames, was

the owner of the automobile, it had not been abandoned, as evidenced by his, Ames, presence and that he, Ames, did not want the vehicle towed and wanted Defendant Hudson to detach his, Hudson's, wrecker from said automobile.

5. Defendant Hudson refused to detach the wrecker unless Ames paid his, Hudson's wrecker fee, and continued to prepare for the towing of said automobile.

6. Defendant Dagenhart, who was on the scene, refused to pay Defendant Hudson's fee.

7. Defendant Summey, dressed as a police officer of the City of Hendersonville, driving a police cruiser of the City of Hendersonville, arrived on the scene. His, Summey's, words to the parties Hudson, Dagenhart and Ames were, "This is on private property, I am here only to see that you do not get in a fight about it."

8. He, Ames, did at no time engage in or

threaten to engage in the act of fighting. In fact, he did state that if necessary, he would rely on the courts to uphold his rights.

9. Defendants Summey, Hudson and Dagenhart left the immediate scene in the direction of the office of Defendant Dagenhart. Ames remained with his vehicle out of sight and hearing of the three Defendants. The Defendants were gone for a period of time estimated by the Affiant to be five to ten minutes. Upon their return, Defendant Summey stated to Defendant Hudson that he, Hudson, could tow the car.

10. Defendant Summey asked Defendant Summey to have Plaintiff Ames straighten the wheels of the automobile, which were at an angle. Defendant Summey told Ames to straighten the wheels. Ames refused to do so and stated, "If I did that I would be aiding and abetting the stealing of my own vehicle."

11. Defendant Summey ordered Ames, who was then seated in his, Ames', car to get out of the car. Ames did so, locking the car as he did so.

12. Defendant Summey ordered Ames to hand him, Summey, the keys to the car. Ames, under protest, did so, pausing only to detach the keys from other keys on the key ring. Defendant Summey did not at that time or any other time have a warrant to confiscate Affiant Ames' car.

13. Defendant Summey then handed the keys of Ames' automobile to Defendant Hudson. Defendant Summey then placed Ames in the rear seat of the police cruiser and locked him therein. The windows of the cruiser were closed, there was no ventilation therein, and since the inside handles of the doors and windows of the cruiser had ben removed, there was no way for Ames to provide himself relief from the excessive heat that had built up within the cruiser.

14. The Defendants Summey, Dagenhart, and Hudson again headed in the direction of Defendant Dagenhart's office, with Defendants Summey and Dagenhart remaining away approximately ten minutes and Defendant Hudson a lesser time.

15. Defendant Summey, upon his return to the cruiser, drove Ames to the Magistrate's office. While he, Summey, was in the cruiser, the air conditioner was turned on.

16. A Warrant for Arrest was prepared by Magistrate Lucille M. Dermid and was sworn to and signed by Defendant Summey. It was offered to Ames for his perusal. Ames noted that it stated that he, Ames, had refused at request of Officer Summey to "get out of his vehicle." Defendant Summey then had the Warrant changed to read "refused at request of Officer Summey, to straighten the wheels of car".

17. Defendant Summey did not advise Ames of his arrest prior to arriving at the Magistrate's office. Enroute to the Magistrate's office, Defendant Summey stated to Ames that he, Ames, would be arrested if he refused to pay the bill of Defendant Hudson. At the Magistrate's office, Magistrate Dermid told Ames that he would go to jail if he refused to pay Hudson's bill. Ames refused to pay the bill, and was allowed to sign a signature bond in the amount of $200.

18. There is no Defendant Medley cited in the above entitled action.

19. Ames made repeated attempts to get Defendants Dagenhart and/or Hudson to return his, Ames, Cadillac automobile to no avail, until he, Ames, initiated a Small Claims action against Defendants Hudson and Dagenhart. The Automobile was returned to him, Ames, prior to

the date of trial without his, Ames, having paid any fee to Defendant Hudson.

20. The Date of Complaint in the Small Claims Action was September 21, 1984; the date the vehicle was returned was 27 September 1984; the Magistrate was the Honorable Hoyle B. Adams; the judgment was in favor of the Plaintiff, Ames, in the amount of $360. and costs; the judgment was not appealed by either Defendant Dagenhart or Defendant Hudson; the sum adjudged was paid the Plaintiff Ames upon the expiration of the appeal period. At the trial, Defendants Dagenhart and Hudson were advised by Magistrate Adams that they, Dagenhart and Hudson, had violated the Constitutional rights of the Plaintiff, Ames.

21. On October 8, 1984, Ames was tried in District Criminal Court on the charge of disorderly conduct. Summey, Hudson, and Dagenhart appeared as witnesses for the prosecution.

Ames, representing himself, entered a Motion for Dismissal based on the State of North Carolina vs. Allen (14 N.C. App 485 188 S.E. 2d 568 (1972), which provides that "where defendant was merely arguing and protesting the confiscation of his property, he had committed no offense and the officer had no authority to arrest him."

22. The motion of Ames, above, was denied by Judge Gash, and Ames was found guilty and sentenced to one day in jail, suspended. Ames appealed, and requested a trial by jury in the Superior Court.

23. The Superior Court session started on January 28, 1985. Ames was told by Prosecutor that he, Ames, would have to remain in attendance until his, Ames appeal was called, otherwise it could be called and dismissed. On

APPENDIX F CONTINUED

February 13, 1985, Ames entered a Motion for Appropriate Relief under 15A - 1415 of the N.C. Statutes. On February 15, 1985, the case of N.C. vs. Ames, a trial de novo, was called. The Assistant District Attorney prosecuting the case requested dismissal, stating, "Officer Summey appeared this morning and stated that he could not present a case against Mr. Ames". The dismissal was ordered without Ames Motion for Appropriate Relief Under 15A - 1415 being heard as required by N.C. State Statute.

The facts contained herein are true, and are of my own knowledge.

This 3rd day of March, 1989.

/s/Dan Ames
/t/ Dan Ames